Supreme Court, U. S.
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No. 80-142

IN THE

Supreme Court of the United States

October Term, 1980

DAVID S. HAYES,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF RESPONDENT IN OPPOSITION

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Respondent, the Commonwealth of Pennsylvania, by the Office of the District Attorney of Allegheny County, Pennsylvania, respectfully sets forth the following in response to the petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this matter on May 1, 1980 at No. 63 Western District, Miscellaneous Docket, 1980:

Question Presented for Review

Whether the judgment of the Pennsylvania Supreme Court, that the trial Court's order granting a criminal defendant's motion to close a pre-trial suppression hearing must be reversed, is based upon an application of relevant federal constitutional principles that fatally varies from this Court's prior decisions?

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No. 80-142

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BRIEF OF RESPONDENT IN OPPOSITION

Constitutional Provisions and Rule of Court Involved

Article I, Section 9 of the Pennsylvania Constitution provides:

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the

> vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.

Article I, Section 11 of the Pennsylvania Constitution provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the Commonwealth in such manner, in such Courts and in such cases as the Legislature may by law direct.

Pennsylvania Rule of Criminal Procedure 323(f), Pa. R. Crim. P. 323(f), provides:

> (f) The hearing, either before or at trial, shall be held in open Court unless defendant moves that it be held in the presence of only the defendant, counsel for the parties, Court officers and necessary witnesses. If the hearing is held after the jury has been sworn, it shall be held outside the hearing and presence of the jury. In all cases the Court may make such order concerning publicity of the proceedings as it deems appropriate under Rules 326 and 327.

Counter-Statement of the Case

Petitioner, David S. Hayes, is charged in a criminal information, filed with the Court of Common Pleas of Allegheny County, Pennsylvania, by the District Attorney of Allegheny County, with committing certain sexual offenses upon a seventeen-year old male high school student. News media interest in this matter was unusually high because, at the time of the alleged offense, the petitioner was a member of the state legislature, representing a district from Erie County in the Pennsylvania House of Representatives. As a result of this interest, enhanced by the alleged use of drugs, together with the sexual nature of the crime, media reports, both print and electronic, were frequent and intensive between the time of the petitioner's arrest and the date set for the pre-trial hearing scheduled on these charges for March 10, 1980.

Pursuant to his pre-trial motion for relief, petitioner sought to have the suppression hearing held "in the presence of only the defendant [petitioner], counsel for the parties, Court officers, and necessary witnesses," pursuant to Rule 323(f) of the Pennsylvania Rules of Criminal Procedure, Pa. R. Crim. P. 323(f), 19 P.S. Appendix (Purdon's Pamph., 1980). The assistant district attorney in the matter joined in the petitioner's motion in order to "protect the rights of the defendant and give him a fair trial. . . . so that no jurors, prospective jurors will be tainted by hearing any evidence outside of the Courtroom" (HT 2).[1] Such position was apparently influenced by the provisions of the Pennsylvania Rules of Criminal Procedure applicable to such hearings[2] and the

[1] The letters "HT" followed by the numerical reference refers to the pages of the Hearing Transcript held on March 10, 1980.

[2] Pa. R. Crim. P. 323(f), *supra*.

recent decisions of the Pennsylvania Supreme Court[3] and this Honorable Court,[4] in light of the knowledge of the prosecutor of the publicity already generated by the case, and the high potential for additional publicity.[5] Also, the prosecutor undoubtedly was aware of the high potential for a reversal of a conviction wherein a jury *may* have been exposed to publicity relevant to the potential defense to be advanced by the defendant.[6]

These considerations were extremely influential in this case because the trial of the charges was to immediately follow the suppression hearing.

With the agreement of the prosecutor, the lower court felt itself particularly bound to follow the provisions of the Pennsylvania Rules of Criminal Procedure and close the pre-trial suppression hearing, consistent with Pa. R. Crim. P. 323(f).

During the proceedings on the petitioner's motion to close the hearing, the trial court was presented with a request to intervene on behalf of the *Pittsburgh Press.* The Court denied the request to intervene after argument thereon. Counsel for the *Pittsburgh Press* was then given the opportunity to seek such a stay from the Supreme Court of Pennsylvania. Such a stay was granted on

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[3] *Philadelphia Newspapers v. Jerome,* 478 Pa. 484, 387 A.2d 425 (1978).

[4] *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

[5] The prosecutor made note at the hearing held on March 10, 1980 in the trial court of the number of media present in the courtroom. (HT 2).

[6] See *Commonwealth v. Brado,* 470 Pa. 306, 368 A.2d 643 (1977), a case arising from a criminal jury trial in Allegheny County, Pennsylvania.

March 10, 1980, by Justice (now Chief Justice) Henry X. O'Brien, of the Pennsylvania Supreme Court. The *Press* also filed petitions requesting the Pennsylvania Supreme Court to exercise its plenary jurisdiction in the matter pursuant to Pennsylvania's "Judicial Code," Act of July 9, 1976, P.L. 586, No. 142, §2; 42 Pa. C.S.A. §726, and for summary reversal of the trial Court's Order.

Oral arguments were presented before the Pennsylvania Supreme Court on the following day, March 11, 1980. On March 13, 1980, the Pennsylvania Supreme Court stayed all further proceedings in the trial Court.

On May 1, 1980, a majority of the Pennsylvania Supreme Court, for differing reasons, agreed that the order of the lower Court would be reversed and the matter remanded to the lower Court for its action.[7]

The Supreme Court of Pennsylvania on June 18, 1980 granted the petitioner's request for a stay of its order of May 1, 1980 pending the filing of a petition for certiorari in this Honorable Court.

The instant brief in opposition is filed in compliance with the Court's request of September 17, 1980.

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[7] For the information of the Court, the now established policy of the Office of the District Attorney of Allegheny County is that it will not join in any request to close pre-trial hearings, but will suggest to the trial Court that the criminal defendant, movant under Pa. R. Crim. P. 323(f), be required to come forward with evidence to support the need for the closure order. It is believed this is similar to the policy adopted by the United States Department of Justice, and will create a record for review by an appellate court and any purported intervenor. It is admitted that this policy is a result of the experience in the Courts below in the instant matter.

Summary of Argument

The petitioner's request for this Court to review the decision of the Supreme Court of Pennsylvania should be denied where, although your respondent recognizes some confusion on the question of the right of access to pre-trial suppression hearings, the decision of the Pennsylvania Court is not based upon an application of federal constitutional principles, contrary to prior decisions of this Court. A cognizable federal claim is not before this Court as a result of the filing of the present petition for certiorari.

ARGUMENT

The judgment of the Pennsylvania Supreme Court, that the trial Court's order granting a criminal defendant's motion to close a pre-trial suppression hearing must be reversed, is not based upon an application of relevant federal constitutional principles that fatally varies from this Court's prior decisions.

The petitioner's request that this Honorable Court review the decision of the Pennsylvania Supreme Court in this matter must necessarily start from an understanding of the basis upon which the highest Court of Pennsylvania rendered its judgment. Such an understanding, because of the division in views expressed by that seven member Court, is not easily arrived at without some review of the stated reasons for the separate views of the individual members of the Pennsylvania Supreme Court.

On May 1, 1980, five separate opinions (or statements) were filed by the Justices of the Pennsylvania Supreme

Court. Justice Nix in his opinion announcing the judgment of the Court, after reviewing the various views expressed in this Court's decision in *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 99 S.Ct. 2898, 61 L. Ed.2d 608 (1979), and the Pennsylvania decisions under Article I, §11 of the Pennsylvania Constitution,[8] states his view thusly:

> "Nevertheless, we terminate this review of the state constitutional provisions, as we did with the federal constitution, with the conclusion that the use of closure of a pre-trial suppression proceeding may properly be limited where there is an effective and efficient alternative means to assure the accused's fair trial rights."
>
> Appendix to Petition at 12a, 414 A.2d at 322.

Justice Nix then proceeds to find that selection and sequestration of the jury for the trial of this case prior to the pre-trial suppression hearing would fully protect the petitioner's right to a fair trial.[9]

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[8] "Most recently, this Court held that a pre-trial suppression hearing closure in order to protect the fair trial rights of the accused did not offend the Pennsylvania Constitution."
Philadelphia Newspapers, Inc. v. Jerome, 478 Pa. 484, 387 A.2d 425 (1978), 414 A.2d at 322, Appendix to Petition at 11a.

[9] Although your Respondent, in argument before the Pennsylvania Supreme Court, indicated that the *fair trial* right of the petitioner would not necessarily be adversely affected by the alternative procedure, it was not asserted that your Respondent would not be adversely affected in the presentation of its case by the suggested alternative procedure. In this regard, Respondent submits that footnote 26 to Justice Nix's opinion infers too much from answers to questions posed at oral argument.

Justice Larsen's disposition of the issue is simply expressed:

> "I would hold that all criminal proceedings are open to the public and the media. The public's and the media's right to attend these proceedings is absolute. Article I, Section 11 of the Pennsylvania Constitution provides "All Courts shall be open"; this article prohibits secret or closed hearings and trials."
>
> Petitioner's Appendix at 25a-26a, 314 A.2d at 328.

Justice Flaherty's position, quite similar to Justice Larsen's also is simply expressed:

> "Quite simply, our Constitution plainly states, 'All Courts shall be open,' thus *proscribing* the closing of a Court proceeding. . . in no event is the closure of a Court proceeding constitutionally permissible."
>
> Petitioner's Appendix at 26a, 314 A.2d at 328.

Justice Kauffmann, also concurring in the judgment, separately wrote to express his position that, after a review of *Gannett, supra,* he could conclude that five members of this Court expressly recognized a "federal constitutional right of public access to pre-trial suppression hearings." Petitioner's Appendix at 32a, 314 A.2d at 330. However, because he could not find agreement among this Court upon the "appropriate standard of review" or the "Specific Constitutional underpinnings" of the right, Justice Kauffmann looked to the Pennsylvania Constitution and found that "the public's right of access to pre-trial suppression hearings is guaranteed by Article I, Section 11 of the Pennsylvania Constitution." Petitioner's Appendix at 40a, 314 A.2d at 334. Justice Kauffmann then concludes:

> I would hold that the public and the press have a right of access to pre-trial suppression hearings protected by both the United States and Pennsylvania Constitutions, reverse the Order of the trial Court and remand for a hearing in accordance with the standards set forth in this opinion.
>
> Petitioner's Appendix at 50a, 314 A.2d at 338 (footnotes omitted).

In a footnote to his conclusion Justice Kauffmann sets forth his appropriate standard for review as "whether any restriction on access is strictly and inescapably necessary in order to protect defendant's right to a fair trial." *Id.* n.22. He would require all available alternatives to closure to be reviewed. *Id.*

Finally, in a dissenting opinion joined by Chief Justice Eagen and Justice O'Brien, Justice Roberts essentially states that the issue he sees presented in the instant matter was disposed of in *Philadelphia Newspapers, Inc. v. Jerome,* 478 Pa. 484, 387 A.2d 425 (1978), a decision from which this Court, on the same day as it filed its opinion in *Gannett, supra,* dismissed the appeal for want of a substantial federal question. Justice Roberts noted that only three of the Justices would find support in the Pennsylvania Constitution for requiring that orders closing pre-trial hearings be more strictly limited than was set forth in *Jerome, supra.* Petitioner's Appendix at 65a, 314 A.2d at 344.

Your Respondent, the Office of the District Attorney, the prosecutor below, would submit that the decision of the Supreme Court of Pennsylvania in this matter creates such significant confusion over the appropriate standard that a trial court in Pennsylvania must use to

guide the exercise of its discretion when faced with a defendant's request to close a pre-trial suppression hearing that the District Attorney's Office has now attempted to guide its position in these matters by taking all five views into consideration. A majority of the Justices of the Pennsylvania Supreme Court in this case expressed their opinion that there is no absolute right of access to a pre-trial suppression hearing under the United States Constitution. This Court recently made it clear in *Richmond Newspapers, Inc. v. Virginia*, _____ U.S. _____, 100 S.Ct. 2814, _____ L.Ed.2d _____ (1980) that the decision in *Gannett, supra*, established that neither the public nor the press has an enforceable right of access to a pre-trial suppression hearing under the Sixth Amendment.

In the decision of the Pennsylvania Supreme Court, three Justices would base their view that there is a constitutionally-based right of access upon the Pennsylvania Constitution, either exclusively or coextensively with the United States Constitution. See Petitioner's Appendix 25a, 26a and 50a, and 414 A.2d at 328 and 334. The three dissenting Justices would hold that the issue was controlled by *Philadelphia Newspapers v. Jerome, supra*. Justice Nix in his opinion expressed the belief that the Court was attempting to apply the principles of *Jerome* to the case before it. Justice Nix additionally stated:

> "Even if we were to relegate the public's right to access to a common law tradition, there is no justification to deny the right on Sixth and Fourteenth Amendment grounds where an alternative measure could accomplish the desired result."
>
> Petitioner's Appendix at 15a, 414 A.2d at 323.

Petitioner argues to this Court that the Pennsylvania Supreme Court decision in this case conflicts with this Court's decision in *Gannett,* as reaffirmed in *Richmond Newspapers.* Your respondent submits that while the Pennsylvania Court's decision may vary from the confluence of views expressed by this Court in *Gannett* as to the federal constitutional considerations involved, as demonstrated from the foregoing analysis of the separate opinions filed below, the recognition of a general right of access is not necessarily arrived at upon grounds directly related to federal constitutional provisions. Only insofar as Justice Nix determines that the requirement of exploration of available alternatives is not in "disagreement" with the views of the members of this Court in *Gannett* can the petitioner in the instant matter assert there is a federal constitutional basis for the judgment of the Pennsylvania Supreme Court in this matter. However, in light of other provisions of Justice Nix's opinion analyzing the Constitution of Pennsylvania and common-law tradition, it is reasonable to assert that the decision below is based upon grounds independent of federal constitutional provisions.

While your respondent believes that the alternative procedure possibly required to be utilized in the instant case is unacceptable to the prosecutor and defense attorney in this case, for different reasons,[10] requiring exploration of the alternatives to disclosure available in a particular case does not necessarily run afoul of this Court's holding in *Gannett.* However, to the extent that Justice Nix's opinion in support of the judgment of the

[10] As noted in several of the opinions below, the prosecutor's right to appeal suppression orders pre-trial may be impaired by such a procedure. Also, the jury selection process must proceed without a clear knowledge of what evidence *will* be introduced.

Pennsylvania Supreme Court can be read as being based upon a recognized right of access to pre-trial suppression hearings under the United States Constitution, it starts from a premise not recognized in *Gannett* and therefore may raise questions as to infringements upon the right to a fair trial guaranteed by the United States Constitution. The absence of such allegations in the instant petition must be noted, however.

Despite agreeing with the petitioner that the decision below may create confusion and conflict over the issue of right to access, particularly in Pennsylvania,[11] as a result of the fragmented Court below, it is submitted that the judgment below is not necessarily based upon the application of federal constitutional provisions in fatal variance with prior decisions of this Court.

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[11] Your respondent notes the ongoing nature of the right of access controversy and the various underpinnings found for resolution of the conflict. See *Federated Publications, Inc. v. Kurtz*, 27 Cr. L. 2489 (Wash. Sup. Ct., July 24, 1980) and *Detroit Free Press, Inc. v. Recorder's Court Judges*, 27 Cr. L. 2491 (Mich. Sup. Ct., July 31, 1980).

Conclusion

For the reasons set forth above, the petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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